Supreme Court U.S.
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No. 02-462

In the Supreme Court of the United States

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Petitioner,

v.

DAVID C. COOPER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I. MR. COOPER ADMITS THAT THE NINTH CIRCUIT HAS ENTERED A DECISION WHICH CONFLICTS WITH THE DECISIONS OF THE SIXTH, EIGHTH AND ELEVENTH CIRCUITS.

Mr. Cooper predicates his Brief In Opposition almost exclusively upon the Ninth Circuit's decision in *Waks v. Empire Blue Cross/Blue Shield*, 263 F.3d 872 (9th Cir. 2001), which is the very decision that conflicts with the decisions of the Sixth, Eighth and Eleventh Circuits, and is the very decision upon which the Ninth Circuit predicated its erroneous ERISA preemption ruling here. Mr. Cooper therefore admits, without expressly saying so, that there now is an alarming and significant conflict among the Circuits as to whether ERISA continues to govern ongoing claims for ERISA benefits by former employees on post-employment insurance policies derived from their employer's ERISA Plan.

In fact, Mr. Cooper implicitly admits that the conflict among the Circuits is even greater than Provident first believed, because he cites to the First Circuit's decision in *Demars v. Cigna Corporation,* 173 F.3d 443 (1st Cir. 1999), which also conflicts with the decisions of the Sixth, Eighth and Eleventh Circuits.

Mr. Cooper does not dispute that ERISA is a federal statute of national application in which there is an overriding need for national uniformity. Mr. Cooper also does not dispute that this Court has repeatedly recognized this fundamental principle of ERISA law, and has done so as recently as a few months ago. *Rush Prudential HMO, Inc. v. Moran*, ___ U.S. ___ , No. 00-1021 (June 20, 2002); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41 (1987).

Given Mr. Cooper's implicit admissions and citation to an additional case which exacerbates the conflict among the Circuits on this important issue of ERISA preemption, the Court clearly should grant Provident's Petition, vacate the Ninth Circuit's Memorandum Decision and aberrant Decision in *Waks*, *supra*, and restore crucial uniformity to ERISA's application among the Circuits and throughout the United States.

II. MR. COOPER ADMITS THAT PROVIDENT'S PETITION PRESENTS AN ISSUE OF FIRST IMPRESSION REGARDING THE SCOPE OF ERISA PREEMPTION.

Mr. Cooper admits on page three of his Brief In Opposition that this Court has never before considered the ERISA preemption issue presented by Provident in its Petition.

Pursuant to *Massachusetts Casualty Insurance Company v. Reynolds*, 113 F.3d 1450 (6th Cir. 1997), millions of ERISA plan participants and beneficiaries throughout the Sixth Circuit are afforded the benefits and protections of ERISA, and correspondingly are subject to ERISA's expansive preemption clause.

Pursuant to *Painter v. Golden Rule Insurance Company*, 121 F.3d 436 (8th Cir. 1997), millions of ERISA plan participants and beneficiaries throughout the Eighth Circuit are afforded the benefits and protections of ERISA, and correspondingly are subject to ERISA's expansive preemption clause.

Pursuant to *Glass v. United of Omaha Life Insurance Company*, 33 F.3d 1341, 1347 (11th Cir. 1994), millions of

ERISA plan participants and beneficiaries throughout the Eleventh Circuit are afforded the benefits and protections of ERISA, and correspondingly are subject to ERISA's expansive preemption clause.

In stark contrast, pursuant to *Demars, supra,* and *Waks, supra,* millions of ERISA plan participants and beneficiaries throughout the First and Ninth Circuits are not afforded the benefits and protections of ERISA, and correspondingly are not subject to ERISA's expansive preemption clause.

Indeed, there is even a conflict **within** the Ninth Circuit as to whether millions of ERISA plan participants and beneficiaries are afforded the benefits and protections of ERISA when asserting claims for ERISA benefits on post-employment insurance policies derived from their employer's ERISA plan. In *Waks, supra,* the Ninth Circuit held that such ERISA plan participants and beneficiaries do not have the benefits and protections of ERISA, but in *Kearney v. Standard Insurance Company*, 175 F. 3d 1084, 1096, n. 1 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 398 (1999), the Ninth Circuit held that such ERISA plan participants and beneficiaries **do** have the benefits and protections of ERISA.

This Court allowed the Ninth Circuit's decision in *Kearney, supra,* to stand when it denied certiorari in 1999, ostensibly because the *Kearney* decision was consistent with longstanding precedent on ERISA preemption from the Sixth, Eighth and Eleventh Circuits, and from the Ninth Circuit itself. *See Peterson v. American Life & Health Insurance Company*, 48 F.3d 404, 408 (9th Cir. 1995); *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 843 n.4 (9th Cir. 1994); *Greany v. Western Farm Bureau Life Insurance Company*, 973 F.2d 812, 817 (9th Cir. 1992); *Tingey v.*

Pixley-Richards West, Inc., 953 F.2d 1124, 1132-1133 (9th Cir. 1992). The Eighth Circuit expressly recognized this fact in *Painter, supra,* when it stated that its ERISA preemption decision "is consistent with the overwhelming majority of preemption decisions involving conversion policies and the ERISA plans which gave them birth", citing *Peterson, Greany* and *Reynolds, supra. Painter, supra* at 440.

This Court therefore should not allow the Ninth Circuit's subsequent contrary decision in *Waks, supra,* to stand, nor should it allow the Ninth Circuit's subsequent contrary decision on Mr. Cooper's claim to stand, since it is predicated exclusively upon the aberrant *Waks* decision, which is contrary to the *Kearney* decision and the decisions of the Sixth, Eighth and Eleventh Circuits, and contrary to the principal object of ERISA itself.

This Court has repeatedly held that "**[T]he principal object of [ERISA] is to protect plan participants and beneficiaries.**" *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 657 (1995); *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). The Ninth Circuit's decision, however, eviscerates the principal object of ERISA and strips the benefits and protections of ERISA from millions of ERISA plan participants and beneficiaries throughout the Ninth Circuit. The Court therefore should grant Provident's Petition given this compelling conflict among the Circuits.

III. MR. COOPER IGNORES THE EXPRESS PROVISIONS OF ERISA AND THE DECISIONS OF THIS COURT INTERPRETING ERISA.

The express provisions of 29 U.S.C. § 1002(1) clearly demonstrate that Congress intended ERISA to govern every

type of ERISA plan that either once "**was** established" or still "**is** maintained" by an employer. The change from past tense to present tense in such an unambiguous manner readily demonstrates that Congress intended ERISA to govern all claims for benefits derived from any type of ERISA plan that once "**was** established" by an employer, regardless of whether the ERISA plan continued to exist until the time of an insured's claim.

The express provisions of 29 U.S.C. § 1144(a) clearly demonstrate that Congress intended ERISA to "supersede any and all State laws insofar as they may now or hereafter relate to **any** employee benefit plan", regardless of whether the ERISA plan continued to exist until the time of an insured's claim.

Moreover, the express provisions of 29 U.S.C. § 1002(7) clearly demonstrate that Congress intended ERISA to continue to apply to all post-employment claims for ERISA benefits on policies derived from an ERISA Plan, regardless of whether the ERISA Plan continued to exist, because Congress defines an ERISA plan "participant" to include "any employee **or former employee** of an employer."

The only way a former employee could assert such a claim for benefits is if he had formally converted his ERISA plan benefits into an individual policy, or, like Mr. Cooper, had merely elected to continue coverage by paying the premiums himself upon termination of his employment. Therefore, Congress clearly contemplated the filing of claims for ERISA benefits by former employees on their post-employment policies derived from their employer's ERISA Plan, by formal conversion or by mere election of continued coverage, regardless of whether the employer's ERISA Plan

continued to exist until the time of the former employee's claim.

This Court has repeatedly recognized that ERISA specifically includes former employees within its definition of ERISA plan "participants", and that such ERISA plan participants are subject to ERISA with regard to all lawsuits brought by them for ERISA benefits. *See, Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54 (1987); *Rush Prudential, supra*, citing *Pilot Life, supra* at 56. This Court has expressly held that "Congress' choice of language is significant" in determining the scope of ERISA preemption. *Fort Halifax Packing Company v. Coyne,* 482 U.S. 1, 8 (1987). Here, Congress' choice of language in §§ 1002(1), 1002(7) and 1144(a) is not only significant, it is dispositive.

Mr. Cooper's superficial reliance upon this Court's decision in *Fort Halifax, supra,* is misplaced, at best, because that case involved only the issue of whether ERISA preempted a state statute requiring the one-time payment of a severance benefit to laid-off workers, which clearly has nothing to do with the issue here: whether ERISA continues to govern ongoing claims for ERISA benefits by former employees on post-employment insurance policies derived from the employer's ERISA Plan.

Indeed, this Court expressly recognized in *Fort Halifax, supra,* that there is a fundamental difference between a statute which requires a one-time benefit payment and an ERISA plan which requires ongoing payments and ongoing ERISA fiduciary duties. *Fort Halifax, supra* at 12-14. In fact, whenever an ERISA plan provides for continued ERISA benefits for as long as the plan participant remains disabled, then the employer's and the insurer's ERISA fiduciary duties continue on and on, long after and notwithstanding the

intervening termination of the ERISA plan itself. Therefore, the continued existence of an ERISA plan is not a condition precedent to ERISA preemption. *Fort Halifax, supra.*

Mr. Cooper's allegation that his post-employment policy does not "relate to" his employer's ERISA plan is fundamentally flawed because he would have no relationship with Provident or cause of action against Provident without his employer's ERISA plan. This Court has expressly held that the words "relate to" should be construed expansively, and Mr. Cooper's attempt to construe this provision of ERISA as narrowly as possible flies in the face of this Court's precedent to the contrary. *See Fort Halifax, supra* at 8.

IV. MR. COOPER IGNORES THE EXPRESS PROVISIONS OF RULE 10 OF THIS COURT.

Rule 10(a), *U.S. Supreme Court Rules of Practice,* expressly provides that two compelling reasons for this Court's review are (1) a U.S. court of appeals has entered a decision in conflict with the decision of another U.S. court of appeals, and (2) a U.S. court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Mr. Cooper admits in his Brief In Opposition that the Ninth Circuit has entered a decision which conflicts with the decisions of the Sixth, Eighth, Ninth and Eleventh Circuits. Provident's Petition therefore should be granted for this reason alone.

Contrary to Mr. Cooper's allegation, the memorandum nature of the Ninth Circuit's decision is irrelevant as a matter of law because it is predicated exclusively upon the Ninth Circuit's reported decision in

Waks, supra, which conflicts with the Ninth Circuit's *en banc* decision in *Kearney, supra,* and which conflicts with the decisions of the Sixth, Eighth and Eleventh Circuits as well.

Furthermore, Mr. Cooper already has improperly attempted to use the Ninth Circuit's memorandum decision against Provident in violation of Ninth Circuit Rule 36-3 in unrelated litigation within the Ninth Circuit. Indeed, according to Mr. Cooper, every Provident insured who sues Provident in the Sixth, Eighth, Ninth and Eleventh Circuits can use the Ninth Circuit's memorandum decision against Provident notwithstanding the contrary precedent in those Circuits, just like Mr. Cooper improperly attempted to do in Arizona notwithstanding the contrary Ninth Circuit precedent in *Kearney, supra.*

Therefore, it is disingenuous for Mr. Cooper to allege that there is no harm to Provident simply because the Ninth Circuit's decision is a memorandum decision. The harm is readily apparent if Mr. Cooper and other plaintiffs throughout the country can use the Ninth Circuit's memorandum decision as offensive collateral estoppel against Provident even in Circuits where there is longstanding judicial precedent to the contrary. Provident, like millions of other ERISA plan participants and beneficiaries, would not have the uniform benefits and protections of ERISA depending on which Circuit it found itself in as an ERISA defendant.

Mr. Cooper also ignores the second compelling reason under Rule 10(a) for this Court's review because the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings that this Court's review is imperative.

The Ninth Circuit predicated its Memorandum Decision exclusively upon the material point of fact that the

ERISA plan terminated "before Cooper filed his claim" (App. 4a).

The Ninth Circuit's misstatement of this material point of fact contradicts the Rule 52 Findings of Fact by the District Court that Mr. Cooper had filed his claim for ERISA benefits on the Capin ERISA Plan **two months before** the Plan terminated, and that Mr. Cooper had sought ERISA benefits all the way back to March 1993, **over 2½ years before** the ERISA Plan terminated. Indeed, it is difficult to imagine how Mr. Cooper's claim could not be governed by ERISA, when he asserted a claim on an existing ERISA Plan for ERISA benefits going all the way back to over 2½ years before the ERISA Plan even terminated. This is exactly what Mr. Kearney did, which conclusively demonstrates how this particular panel ignored its own *en banc* decision in *Kearney, supra*, and erroneously perpetuated the conflict with the Sixth, Eighth and Eleventh Circuits by relying exclusively upon its aberrant Decision in *Waks, supra*, which had created the conflict one year earlier.

By knowingly predicating its decision on a material point of fact that contradicted outright the Rule 52 Findings of Fact of the District Court, the Ninth Circuit violated longstanding Ninth Circuit precedent on the applicable standard of review. *See L.K. Comstock & Company v. United Engineers & Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989); *InterPetrol Bermuda, Ltd. v. Kaiser Aluminum International Corporation*, 719 F.2d 992, 998 (9th Cir. 1983).

CONCLUSION

The Ninth Circuit's memorandum decision perpetuates a significant conflict within the Ninth Circuit and among all the Circuits regarding how and when ERISA applies to post-

employment insurance policies derived from ERISA Plans. This conflict with the Sixth, Eighth and Eleventh Circuits, as well as within the Ninth Circuit itself, substantially and deleteriously affects ERISA, which clearly is a rule of national application in which there is an overriding need for national uniformity. The Ninth Circuit's decision also constitutes an alarming departure from the accepted and usual course of judicial proceedings.

Provident therefore respectfully requests the Court to take judicial notice of its own Rule 10(a), which expressly recognizes such conflicts and judicial error as compelling reasons for review, and respectfully requests the Court to grant Provident's Petition for a Writ of Certiorari, vacate the Ninth Circuit's memorandum decision and *Waks* decision, and thereby restore crucial uniformity to ERISA's application within the Ninth Circuit, among all the Circuits, and throughout the United States.

RESPECTFULLY SUBMITTED,

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